



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS
WASHINGTON, D.C. 20314-1000

REPLY TO
ATTENTION OF:

MAY 07 2002

CECC-C

MEMORANDUM FOR DIRECTOR, DEFENSE ACQUISITION REGULATIONS
COUNCIL (ATTENTION: MS. SUSAN L. SCHNEIDER)

SUBJECT: United States Army Corps of Engineers Comments on DFARS Case 2001-D017

1. The United States Army Corps of Engineers ("USACE") wishes to express its concern with the implications of the proposed regulations for multiple award architectural and engineering (A&E) services contracts as well as how the regulations will impact multiple awards to small business, 8(a) and/or HUBZone concerns.
2. The acquisition of A&E services is based upon the selection process codified in the "Brooks Act," 40 U.S.C. § 541 et. seq. The Brooks Act selection procedures are made applicable through 10 U.S.C. § 2855 for military construction and military family housing projects and 33 U.S.C. § 569(b) when USACE awards civil works A&E contracts.¹
3. The Brooks Act selection procedures require a competitive selection process based upon demonstrated competence and qualifications. The competitive field is narrowed to the three most highly qualified firms after which the Contracting Officer is required to negotiate a fee that is fair and reasonable to the Government with the most highly qualified firm. If such a fee cannot be agreed upon, the Contracting Officer would negotiate with the next most highly qualified firm and so forth. This selection process is designed to take "price or cost" as a determining factor out of the selection equation. As such, section 803 of Pub. L. 107-107, 115 Stat. 1178 (2001) and the proposed regulations are in direct contravention of these requirements where they mandate the consideration of "price or cost" under each order as one of the factors of in the selection decision.
4. Recognizing that the Brooks Act selection procedures may be inconsistent with the usual multiple award contracting scheme, FAR 16.500 specifically provides that while agencies are not precluded from making multiple awards for architect-engineer services, the selection of contractors must be consistent with Subpart 36.6-Architect-Engineer Services, which sets forth the Brooks Act selection procedures. We consider these provisions to exempt A&E service contracts from the task order selection procedures usually required when an agency utilizes multiple award IDIQ contracts.

¹ Section 569b provides that "Contracts for architect and engineering services, and surveying and mapping services, shall be awarded by the Chief of Engineers in accordance with . . . (40 U.S.C. §541 et seq.) [the Brooks Act]." Section 569b was included within a supplemental appropriations act for the Corps of Engineers. Pub.L. 98-63, 97 Stat. 311 (1983). USACE has interpreted section 569b as a permanent general provision.

5. In this vein, USACE frequently utilizes multiple award indefinite delivery contracts in the A&E arena while implementing a selection process consistent with the Brooks Act and FAR Subpart 36.6. Under this process, USACE publicly announces its requirements for A&E services and interested firms submit their qualifications. One or more contracts are then awarded to the most highly qualified firms. Specific task orders are then awarded to the most highly qualified firm for the particular work required under the task order after negotiation of a fair and reasonable price.

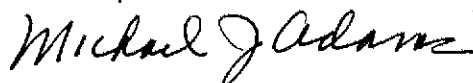
6. Based upon the guidance provided in the FAR and the requirements of the Brooks Act, USACE requests that the DOD regulations be changed to exempt A&E services from the requirements set forth in the proposed changes to DFARS Part 216.

7. As an additional concern, the committee should consider the fact that many of the multiple award IDIQ solicitations issued by USACE also include small business set-aside, 8(a), and/or HUBZone awards. It is often the case that USACE will award several contracts under a multiple award IDIQ solicitation to firms on an unrestricted basis and under that same solicitation award several other contracts to small business, 8(a), and/or HUBZone firms for the same scope of work but usually at a lower dollar capacity. The individual task orders are then evaluated to determine if they are more appropriate for completion by the firms selected through unrestricted competition or could be completed by the small concerns. The task order is then competed within the appropriate group or negotiated on a sole source basis with for example an 8(a) concern.

8. Because the proposed regulations would require USACE to compete all task orders among the various awardees, the small business, 8(a) and HUBZone concerns would necessarily be required to compete against larger firms. Such a competition would greatly undermine the ability of small concerns to obtain task orders in a multiple award setting as described above. With these concerns in mind, USACE suggests that the committee revise the proposed regulations to address the small business concerns noted above by including a provision that would afford contracting officers the discretion not to compete task orders that are designated for award to small business, 8(a) and/or HUBZone concerns.

9. The point of contact for this matter is Edward Goldstein who can be reached at (202) 761-5250.

Sincerely,



Michael J. Adams
Assistant Chief Counsel
for Procurement